United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1217

To be argued by
EDWARD J. LEVITT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1217

UNITED STATES OF AMERICA,
Appellee,

—v.—

VICTOR IADAROLA, GRACE HELEN IADAROLA
and BENITO IADAROLA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

EDWARD J. LEVITT,
Special Attorney,
United States Department of Justice

AUDREY STRAUSS,
Assistant United States Attorney,
Of Counsel.

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Preliminary Statement

Victor Iadarola, Grace Iadarola and Benito Iadarola appeal from judgments of conviction entered on May 7, 1976, in the United States District Court for the Southern District of New York, after a seven-day trial before the Honorable Henry F. Werker, United States District Judge, and a jury.

Indictment 75 Cr. 365, in three counts, was filed on April 11, 1975. Count One charged Victor, Grace and Benito Iadarola, as well as Lew Markus, a/k/a Louis Rubin ("Rubin"), with having conspired to possess, sell, pass, and deliver counterfeit United States treasury bills in $100,000 denominations, in violation of Title 18, United States Code, Section 371. Count Two charged each of

the Iadarolas and Rubin with possession, passing, selling, and attempting to pass and sell two counterfeit United States treasury bills in $100,000 denominations, in violation of Title 18, United States Code, Sections 472 and 2. Count Three charged each of the Iadarolas and Rubin with selling and delivering two counterfeit United States treasury bills in $100,000 denominations, in violation of Title 18, United States Code, Sections 473 and 2.

Prior to trial the Iadarolas and Rubin moved to suppress two counterfeit $100,000 United States treasury bills which had been seized by Secret Service agents on March 31, 1975. One bill was seized from the person of Rubin at the time of his arrest; the other bill was found, along with the Iadarolas, in Room 810 of the Waldorf Astoria Hotel. Judge Werker held a hearing on this motion on February 18 and 19, 1976, following which the motion was denied. (S. Tr. 2/19/76, 4-6).*

Trial commenced on March 11, 1976, and ended on March 19, 1976, when the jury convicted each of the Iadarolas on all three counts.**

On May 7, 1976, Judge Werker sentenced each of the defendants, Victor, Grace Helen and Benito Iadarola, to five years imprisonment on each count, to run concurrently; however, execution of sentence was suspended and each defendant was placed on probation for five years. In addition, a fine of $1,000 was imposed against each defendant on Count One.

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* "S. Tr." refers to the transcript of the suppression hearing on the date indicated thereafter; "Tr." refers to the trial transcript; "GX" refers to Government exhibit; "A" refers to appellant's appendix; "Br." refers to appellants' brief.

** Prior to trial Rubin pleaded guilty to Counts One and Three of the indictment. Upon sentencing, on April 30, 1976, Count Two was dismissed as to Rubin.

Victor Iadarola, Grace Helen Iadarola and Benito Iadarola have been enlarged on bail pending appeal.

Statement of Facts

The Government's Case

On Thursday, March 27, 1975, at the request of Louis Rubin, Chester Gray met Rubin at Penn Station in Manhattan. At that meeting, Rubin claimed he had access to government securities, in denominations of $100,000, which would be stolen from the Federal Reserve Bank. Rubin offered to sell Gray $2,000,000 in these securities at 50% of their face value, 5% of which was to be paid in cash to Rubin upon delivery of the securities. Gray told Rubin he personally did not have the money necessary for the deal but would see if he could find a buyer. (Tr. 35-42, 232-33).

After that meeting, Gray telephoned the United States Secret Service and related Rubin's proposal. Special Agent Paul Sweeney arranged to meet with Gray that evening. At that meeting, pursuant to Agent Sweeney's instructions, Gray spoke with Rubin by telephone and pretended to have a buyer for the securities. Rubin agreed to meet Gray and the buyer at the Peacock Alley, a bar-restaurant located in the lobby of the Waldorf Astoria Hotel at 1:00 p.m. on the following day. The meeting was subsequently rescheduled for 1:00 p.m. on Monday, March 31, 1975. (Tr. 42-45, 234-38). In preparation for the meeting, the Secret Service rented adjoining rooms, Rooms 35A-3 and 35A-4, in the Waldorf Astoria Hotel and put $50,000 in U.S. currency in a safety deposit box at the hotel. (Tr. 218, 219).

Shortly before 1:00 p.m., on Monday, March 31, 1975, Gray and Agent Sweeney seated themselves at a table

in the Peacock Alley, with Sweeney posing as Gray's buyer. Rubin arrived approximately one hour later and joined them.* (Tr. 211-13). Rubin asked Gray if the money was at the hotel. Gray replied that $50,000 was there and a second $50,000 would be delivered in two hours after Sweeney had seen the securities. Sweeney asked Rubin for samples of the securities; Rubin said that he did not have any. Rubin stated that he would take Gray's word that the money was available and make a call to his people for delivery of the securities to the hotel. Rubin then left the table, walked through the lobby and disappeared from view. (Tr. 46-47, 214-15). When he returned shortly thereafter, Rubin told Gray that his people were insisting that Rubin see the $50,000 before they delivered the securities to the hotel. (Tr. 47, 216). Sweeney then agreed to show Rubin the $50,000. Sweeney and Rubin left the Peacock Alley and proceeded to the safety deposit boxes where Sweeney displayed $50,000 to Rubin. (Tr. 47-48, 216-17). They then returned to the lobby and rejoined Gray at the table. Shortly thereafter, Rubin excused himself, stating that he had to call "his people" and let them know he had seen the money. (Tr. 47-48, 216-18, 268). When Rubin returned, he said he had spoken to his people and that it would take approximately one hour to have the government securities delivered to the hotel. Rubin also announced that he had decided to take a room at the hotel. Sweeney told Rubin he was staying in Room 35A-3. Rubin said he would give Gray his room number to convey to Sweeney. Rubin and Gray then left together and Sweeney went to Room 35A-3. (Tr. 48-49, 218-19).

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* Shortly after Rubin joined Gray and Sweeney, he excused himself and proceeded to talk to a man wearing a camel hair coat who appeared in the hotel lobby. (Tr. 211-13). As Sweeney learned later, Rubin received $1500 from that man at that time. (Tr. 216-17).

Gray and Rubin proceeded to the registration desk where Rubin registered for Room 810 under the name "Louis Rubin." This occurred at 2:35 p.m. Gray and Rubin then went to a restaurant in the hotel where they ate lunch. After lunch, Gray went to Room 35A-3. (Tr. 23, 49-50; GX 1).

In Room 35A-3, Gray told Sweeney that Rubin had registered for Room 810. At that point, Rubin telephoned and spoke to Gray. Rubin asked Gray to come to his room and Gray agreed. Before Gray proceeded to Rubin's room, Sweeney told him to ask Rubin what the delay was. (Tr. 50-51, 220-22).

Gray then went to Room 810. Rubin was the only person present when Gray arrived. Gray asked Rubin the cause for the delay and Rubin said he would make a telephone call and find out. Rubin then placed a call and asked to speak to "Grace", then he asked for "Benny" and finally he asked for "Victor." After a brief pause, Rubin hung up the telephone and told Gray that he expected delivery shortly. Gray then returned to Sweeney's room and told him what had happened. (Tr. 51-52, 222-23).

At approximately 5:10 p.m. Rubin knocked on the door of Sweeney's room and was admitted by Gray. Rubin was alone. He apologized for the delay, stating that there was a slight problem; there were only "two pieces" available and his people wanted Sweeney to advance $20,000 on the "two pieces" to show good faith. The remaining "eight pieces" could be had by noon the following day, with a second $1,000,000 the day after. Sweeney then asked to see the "two pieces" and Rubin handed him one $100,000 treasury bill from his inside coat pocket. Sweeney looked at the bill and immediately determined that it was counterfeit. Sweeney then asked

Rubin for the second treasury bill and Rubin stated that if Sweeney were not willing to pay the $20,000 first, Rubin would have to take the first bill back to his people, who were waiting in his room, and get the second bill from them. Rubin said that his people would not release both bills at the same time without payment. Sweeney then told Rubin that Sweeney's people would be upset at this change and asked Rubin to step into the hallway while Sweeney called his people to see if they wanted to purchase only two treasury bills. Rubin then left the room. (Tr. 52-54, 224-27, 678).

After Rubin left, Agent Sweeney consulted with his supervisor, Special Agent James Heavey, who had been monitoring the conversations in Room 35A-3. They agreed to proceed to arrest Rubin as he left Sweeney's room to exchange the first treasury bill for the second one. Rubin's arrest was then effected in this way. (Tr. 54-55, 227-30, 393-94, 423-24, 426, 613). Upon his arrest, Rubin was searched and found to have in his possession, among other things, one counterfeit U.S. treasury bill in the denomination of $100,000 and a key to Room 810. The key was turned over to Agent Heavey. (Tr. 394-97, 426-27; GX 3, 12).

Agent Heavey, in the company of Special Agent John Vezeris, other agents of the Secret Service and detectives from the New York Police Department then proceeded to Room 810, where Agent Heavey opened the door using the key found on Rubin. Upon entering this room the agents found Victor, Grace and Benito Iadarola. Grace Iadarola was reclining on the bed; Victor and Benito Iadarola were sitting on two of the three chairs in the room. The three Iadarolas were thereupon placed under arrest. Victor and Benito Iadarola were frisked and then searched. Grace Iadarola was instructed to get off the bed but since there was no female agent present, she was neither frisked nor searched. (Tr. 427-29, 613-17).

When Grace Iadarola was told to get off the bed she was not told where to sit. At the time, all three chairs in the room were unoccupied. Grace Iadarola got off the bed and proceeded to sit on top of the right-hand side of a dresser. At the trial, the height of the dresser was estimated to be as high as the jury-box railing. (Tr. 465-66, 617-18). Each of the Iadarolas was subsequently interviewed by Agent Heavey while Agent Vezeris and others searched the room. When Agent Heavey interviewed Grace Iadarola, at Heavey's instructions, she got off the dresser and sat on a chair. (Tr. 469-70, 619-20).

During the course of Agent Heavey's interviews, Agent Vezeris searched the room. (Tr. 471, 621). At the foot of the bed, Agent Vezeris found Rubin's attache case, containing a slip of paper on which was handprinted the name "Grace H. Idadarola", followed by an address and three telephone numbers. The piece of paper also contained the words "Victor Iadarola, Bklyn., N.Y." (Tr. 472-73, 539, 623-24, 627-28, 629-30, 714; GX 8).

When Grace Iadarola got off the right-hand portion of the dresser, Agent Vezeris searched the dresser. In the upper right-hand drawer Agent Vezeris found a $100,000 U.S. treasury bill. Vezeris showed this bill to Agent Heavey who immediately recognized it as a counterfeit bill.* (Tr. 471-72, 621-23, 629-30; GX 6; Grace Iadarola Exhibits B1-5).

In Room 810, during the search, Agent Heavey interviewed Benito Iadarola who denied knowing anyone by the name of Lew Markus or Louis Rubin and denied know-

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* All parties stipulated that if the Government's expert were called to the witness stand he would testify that, based upon his examination, he determined that this bill, GX 6, and the one found on Rubin at the time of his arrest, GX 3, were counterfeit. (Tr. 765-68).

ing anything about counterfeit treasury bills. Benito Iadarola said that his wife had come to the room to collect a debt and he had merely come along for the ride. (Tr. 466-68, 541).

Agent Heavey next interviewed Victor Iadarola. Victor Iadarola denied knowing anything about counterfeit treasury bills and denied knowing anyone by the name of Lew Markus or Louis Rubin. Victor Iadarola stated he had merely accompanied his brother and sister-in-law to Room 810. (Tr. 468-69, 499-500, 541). Victor Iadarola's wallet contained a piece of paper with the name "Lous Rubin" and a number printed on it (Tr. 475-76; GX 4) and a blank check drawn on the account of "Lewis Marcus" and endorsed "Lew Marcus." (Tr. 476; GX 5).

Agent Heavey then interviewed Grace Iadarola, who denied knowing anyone by the name of either Lew Markus or Louis Rubin. She also denied knowing anything about counterfeit treasury bills and claimed that she had come to Room 810 to collect a debt. (Tr. 470-71, 541).

On April 1, 1975, the day following her arrest, Grace Iadarola was once again interviewed by Agent Heavey. This time, Grace Iadarola admitted knowing Louis Rubin. She stated that she had been introduced to Rubin sometime before, that she had helped him to get a job, that she had loaned him some money and that Rubin owed her money in connection with a business transaction. She stated that the only reason she had been in Room 810 on March 31, 1975, was to collect the money Rubin owed her. She further stated that, because she was pregnant, her husband, Benito Iadarola, and her brother-in-law, Victor Iadarola, had accompanied her. (Tr. 473-75, 521).

The Defendants' Case

The defendants presented no witnesses.

ARGUMENT

POINT I

The trial court did not abuse its discretion in denying defendants' motion for a judgment of acquittal.

Appellants' first point on appeal is the highly frivolous contention that the trial court should have entered a judgment of acquittal at the conclusion of the Government's opening for failure to state a *prima facie* case. This claim is made without persuasive legal authority and without a basis in fact.

This Court has stated that a judgment of acquittal on this ground is warranted only if the Government's opening demonstrates that "the government had no right to a conviction." *United States* v. *Greenberg*, 268 F.2d 120, 123 (2d Cir. 1959). Other circuits have taken comparable approaches to this issue. *United States* v. *Capocci*, 433 F.2d 155, 158 (1st Cir. 1970) (some indication in opening that Government could prove necessary element sufficient to warrant denial of motion for acquittal); *Hanley* v. *United States*, 416 F.2d 1160, 1164 (5th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (unless Government's opening affirmatively shows that the Government has no case, denial of motion for acquittal appropriate); *Butler* v. *United States*, 402 F.2d 749, 750 (5th Cir. 1968) (inadequacies in the Government's opening do not require dismissal if the evidence presented supports the verdict); *McGuire* v. *United States*, 152 F.2d 577, 580 (8th Cir. 1945) (acquittal appropriate only "when it clearly and affirmatively appears from the opening statement that the charge against the defendant cannot be sustained under any view of the evidence consistent with the statement");

Cody v. *United States*, 73 F.2d 180 (9th Cir. 1934) (not appropriate to grant motion for acquittal if evidence submitted to jury supports verdict). Appellants have been unable to bring to the Court's attention a single federal case requiring reversal of a conviction on the ground that the Government's opening failed to state a sufficient case and appellants themselves concede that the granting of an acquittal on this ground is a matter within the discretion of the trial court. (Br. at 10).

Here, it can hardly be claimed that Judge Werker abused his discretion in denying a motion for acquittal following the Government's opening. The gist of the Government's opening was that on March 31, 1975, the Iadarolas and their co-defendant Rubin had access to and attempted to sell two counterfeit $100,000 United States treasury bills to an informant and an undercover agent of the Secret Service. The jury was informed that it would see the counterfeit bills and hear the testimony of the informant, the undercover agent, and the various agents who surveilled the meetings which occurred on March 31, 1975. Although the statement was short and concise, it obviously encompassed not merely a bare statement of the ultimate facts that the Government would prove; it included an outline of the essential events, a preview of the witnesses and description of the other evidence to be presented. This opening was entirely sufficient and the district court quite properly denied the motion for acquittal based on the claim that it was deficient.

POINT II

Sufficient independent evidence was adduced against each defendant to admit as evidence against them the statements of their co-conspirator Rubin.

The Iadarolas contend that the independent evidence adduced by the Government failed to establish that they were members of a conspiracy and therefore Rubin's statements should not have been admissible against them. Although they initially urge a more stringent test, appellants appear to ultimately concede that the rule in this circuit is that the Government must establish the defendant's participation in the conspiracy by a fair preponderance of independent, non-hearsay evidence. *United States* v. *Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975); *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied*, 397 U.S. 1028 (1969). Defendants argue that the "fair preponderance" test was not met here, claiming essentially that the independent evidence which the Government adduced was no more than a telephone call made by Rubin in which he asked for "Grace," "Benny" and "Victor." They claim that Rubin's use of those names was inadmissible hearsay.* They further argue that the remaining independent evidence—false exculpatory statements and other acts demonstrating consciousness of guilt—did not

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* Relying upon *Glasser* v. *United States*, 315 U.S. 60 (1942), defendants contend that even if Rubin's telephone call is not hearsay it is nevertheless inadmissible for purposes of establishing the conspiracy. (Br. 12, 14). In so urging, they have apparently misconstrued *Glasser*, which does not suggest in any way that independent, non-hearsay evidence must derive from a source other than a co-conspirator, who obviously can commit acts which would constitute independent, non-hearsay evidence for these purposes. See *United States* v. *Nuccio*, 373 F.2d 168, 170-71 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967).

suffice to meet the Government's burden. Appellants are only able to make these arguments by taking bits of evidence out of context. Placed in its proper setting, evidence which they assert to be insufficient actually amounts to more than adequate independent proof of each defendant's membership in the conspiracy.

The evidence established that a meeting had been arranged for 1:00 p.m. in a bar at the Waldorf-Astoria Hotel between Rubin, Gray and Sweeney, with Sweeney posing as a potential buyer of the securities. Although Rubin, Gray and Sweeney had gathered at the hotel by about 2:00 p.m., no attempt was made by Rubin to deliver and to sell the counterfeit bills until approximately 5:10 p.m. From this fact it was fair to conclude that Rubin was waiting for someone to come to the hotel before he could close the deal.

Against this background, the non-hearsay evidence against these defendants can be considered. The evidence which stood against all three defendants equally was the nexus between their arrival at the hotel and the arrival of the counterfeit treasury bills. Clearly, if Rubin had the bills in hand, the deal could have been consummated in the early afternoon. Instead, nothing transpired until about 5:10 p.m. Shortly before then, Gray determined that no one else was present in Rubin's room. Shortly thereafter, Rubin appeared in Sweeney's hotel room with one of the counterfeit treasury bills. Rubin's arrest occurred at that time and upon obtaining the key to Rubin's room, the agents proceed there and find the three defendants apparently awaiting Rubin's return. Their presence there at that time was, in this context, not readily consistent with any innocent explanation.

Putting aside for a moment Grace Iadarola's acts reflecting guilty knowledge, the presence of the second counterfeit treasury bill in the room at that time was further evidence of the defendants' participation in the conspiracy.

A fair inference could be drawn that the counterfeit bill did not get into the bureau drawer without the aid and, certainly, the knowledge of the three defendants. Had Rubin brought it there himself, the deal would have been completed long before the Iadarolas arrived on the scene. The presence of the bill in the room at that time was logically attributable to their participation in the scheme.

As additional independent evidence which stands equally against each of the three defendants, the Government relied upon the telephone call by Rubin in which he asked for "Grace," then "Benny," and then "Victor." This was a classical verbal act and as such it was not hearsay. The utterance accompanied an independently admissible non-verbal act (namely the act of making the telephone call), related to that act and helped to explain it. *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975); *United States* v. *D'Amato*, 493 F.2d 359, 363-64 (2d Cir. 1974); *United States* v. *Glasser*, 443 F.2d 994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971); *United States* v. *Nuccio*, 373 F.2d 168 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967); *United States* v. *Annunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).* Viewed another way, Rubin's utterance of the

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* That Rubin's call to "Grace," "Benny" and "Victor" falls easily within the category of a verbal act can be seen by comparison with the case appellants attempt to distinguish in their brief, *United States* v. *Nuccio*, *supra*. (Br. at 14). In that case a defendant made inquiries as to whether a co-conspirator had gone to Brooklyn or Queens (which were locations at which the co-conspirator was to deliver narcotics). These inquiries were characterized by Judge Friendly as verbal acts rather than testimonial declarations. Rubin's use of the defendants' names as he made the telephone call presents an even more apparent instance in which the utterance amounts to an act rather than a testimonial declaration. Appellants attempt to avoid *Nuccio* on the ground that the verbal acts there involved "instructions" by one co-conspirator to another. (Br. at 14). However, the case law suggests no distinction between "instructions" and all other verbal acts, nor is there a basis for making any such distinction.

three names was simply not a declaration admitted for the truth of any matter asserted therein. Rule 801(c) *Fed. R. of Ev.; United States* v. *Frank*, 494 F.2d 145, 155 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974).

As a further effort to avoid the evidence of Rubin's telephone inquiries, the Iadarolas argue that the "mere asking for three names on the telephone fails to indicate that any one of those individuals was a knowing participant" in the conspiracy. (Br. at 15). This argument is made by viewing the call without the other evidence which explains its significance. The call was made only after Gray asked Rubin what was causing the delay. The fair and sensible inference was that Rubin was calling his confederates to get an answer to that question. The district court's statement that it had drawn this inference was certainly not a misuse of the verbal act evidence, as defendants suggest. (Br. at 16). Once admitted into evidence, the verbal act, like any other evidence, could be the basis for any reasonable inference.

In addition to the evidence which stands equally as against Grace, Benito and Victor Iadarola, additional independent, non-hearsay evidence was presented with respect to each defendant. With respect to Grace Iadarola, it could be fairly inferred that upon the agents' arrival in the hotel room she attempted to conceal the counterfeit bill by casually sitting on the bureau where it was hidden. Appellants argument that she was merely a "frightened creature" seeking "high ground" (Br. at 17), amounts, for what it's worth, to a jury argument which does not negate other fair inferences to be drawn from that evidence. Furthermore, Grace Iadorala's denial that she knew Rubin was shown to be a false exculpatory statement both by her admission on the following day that she did in fact know Rubin and by the paper in Rubin's

attache case which bore her name. It could also be fairly inferred that her claimed lack of knowledge about the counterfeit bills was belied by her presence in Rubin's room at the time that the counterfeit bills arrived on the scene.

With respect to Victor Iadarola, he likewise claimed not to know Rubin when he was in fact found to be in possession of a paper with Rubin's name on it. Similarly, the paper in Rubin's attache case bore the notation "Victor Iadarola, Bklyn, N.Y.," confirming the falsity of Victor's claim that he did not know Rubin. In addition to the false exculpatory statement, it would be fairly inferred that Victor had accompanied Grace to the hotel to protect her and to guard the counterfeit bills, as well as the money they expected to derive from the transaction. Likewise, Victor's claim that he knew nothing of counterfeit bills could be found to be false by virtue of his presence in the hotel room during the time period when Rubin, who had been awaiting delivery, first came into possession of the counterfeit bills.

Benito Iadarolas claim that he did not know Rubin and he did not know anything about counterfeit bills was similarly shown to be false by his presence in Rubin's room at that time. It was surely fair to infer that Benito Iadarola did not arrive in Room 810 without having met Rubin. Likewise, the nexus between the time of his arrival in Room 810 and the arrival of the counterfeit bills could be a basis for the inference that he falsely claimed ignorance of the counterfeit bills. Like Victor's presence, Benito's presence could also be found to have served as protection of the Iadarolas' possession of both the counterfeit bills and the large sums of money they expected to receive that night.

With respect to each defendant, participation in the conspiracy was demonstrated by sufficient independent,

non-hearsay evidence to permit admission of statements of their co-conspirator, Rubin.

POINT III

The evidence of the guilt was more than sufficient with respect to each of the defendants.

Each defendant claims that the evidence was insufficient as to knowledge and intent and as to physical possession of the counterfeit bills to sustain their respective convictions.* These contentions are unsupported by the record viewed, as it must be, in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Arroyo*, 494 F.2d 1316, 1317 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States* v. *Ross*, 464 F.2d 376, 378 (2d Cir. 1972), *cert. denied*, 410 U.S. 990 (1973). In answering this argument the Government will deal mainly with the statements of Rubin made in the course of and in furtherance of the conspiracy, the independent evidence having been set forth in Point II, *supra*.

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* The Government notes, in passing, that possession was not a necessary element for conviction on any count in the indictment. Counts One and Three alleged conspiracy to violate the counterfeiting laws and delivering counterfeit bills respectively, but nowhere charge possession. Count Two does allege possession but alternatively charges appellants with violation of the law by passing, attempting to pass and sell, and concealing counterfeit bills. Thus, defendants could have been convicted on that count without a finding of actual possession. In any event, constructive possession, *i.e*, control and dominion, would satisfy any possession requirement. *United States* v. *Pitts*, 508 F.2d 1237, 1239 (8th Cir. 1974), *cert. denied*, 421 U.S. 967 (1975); see *United States* v. *Cordo*, 186 F.2d 144, 146-47 (2d Cir.), *cert. denied*, 341 U.S. 952 (1951); *United States* v. *DeNormand*, 149 F.2d 622, 624 (2d Cir.), *cert. denied*, 326 U.S. 756 (1945). The evidence more than supported an inference of constructive possession as to each of the defendants.

The first indication from Rubin that others would be involved in the sale of the securities was when he left the initial meeting with Gray and Sweeney to telephone "his people" to arrange for delivery of the bills. After that call he reported back that they had insisted that Rubin see the money before they delivered the bills to the hotel. (Tr. 46-47, 214-16).

At 5:10 p.m., Rubin showed Sweeney one counterfeit bill and told Sweeney that "his people" had brought only one other bill and wanted payment on these two bills as a showing of Sweney's good faith. Upon payment, the balance of the bills would be delivered to Sweeney in two batches over a two-day period. When Sweeney said he wished to see the second bill that Rubin's "people" had brought to the hotel, Rubin said he would have to take the first bill back to his room and give it to "his people." He said that "his people" had the second bill in his room and would not release both bills at the same time without first receiving payment. (Tr. 52-54, 224-27).

From this evidence, coupled with the presence of the Iadarolas in Rubin's room, it was reasonable to infer the Iadarolas were Rubin's "people"; that they had delivered the bills for the transaction; and that they, not Rubin, controlled the method and terms of the sale. Such fair inferences defeat defendants' argument that there was insufficient evidence on the elements of knowledge and intent. If the jury found that the defendants controlled the transaction, it was surely fair to infer that they knew that they were dealing with counterfeit treasury bills from the fact that they were prepared to sell them for only 10% of their face value. See *United States* v. *Cluchette*, 465 F.2d 749, 753 (9th Cir. 1972); *United States* v. *Seay*, 432 F.2d 395, 404 (5th Cir. 1970), *cert. denied*, 401 U.S. 942 (1971). *See also United States* v. *Jacobs*, 475 F.2d 270, 287 (2d Cir. 1973).

Finally, guilty knowledge was further demonstrated by each defendant's false exculpatory statements as well as the inter-related nature of their statements. Grace Iadarola, who tried to conceal the second counterfeit bill, claimed that she had only come to Rubin's room to collect a debt. Benito Iadarola supported her in that assertion. All three denied knowing Rubin, although Grace later admitted that she did know him and Victor had papers in his possession which put the lie to his statement. All three denied knowing anything about counterfeit bills, although it was fair to infer that all three were there for the purpose of delivering the bills to Rubin and, even if only one had physically delivered the bills, the other two witnessed that event as well as any accompanying discussion of the transaction.

Although the Iadarolas may argue that the jury could just have easily drawn innocent inferences as to each of them based upon the events of March 31, 1975, the jury simply did not do so, as evidenced by the verdict. Even if the proof arguably supports inferences of guilt beyond a reasonable doubt and innocence equally, the convictions must nevertheless stand. *United States* v. *Bohle*, 475 F.2d 872, 875 (2d Cir. 1973); *United States* v. *Taylor*, 464 F.2d 240, 244 (2d Cir. 1972).

Finally, the Iadarolas argue that the convictions must be reversed because they are based on the testimony of witnesses whom they discredit and they refer to two statements by the trial court to gain support for their position. (Br. at 23).* The simple answer to this argument is that weighing of the credibility of a witness is solely within the jury's province. *United States* v. *Zanfardino*, 496 F.2d 887, 888 (2d Cir. 1974); *United States* v. *Taylor*, *supra*, 464 F.2d at 245 (and cases cited therein).

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* Whatever Judge Werker's view as expressed during trial, at time of sentencing, he stated, "I feel the verdict was a sound one." (Tr. 938).

POINT IV

There was no accumulation of errors which denied the Iadarolas a fair trial.

The Iadarolas contend that there were three errors which had such a cumulative prejudicial effect as to deny them a fair trial. None of the claimed errors warrants reversal of the convictions.

1. The double hearsay.

The Iadarolas complain that Sweeney testified that when Gray told him about Rubin's call, Gray had said that Rubin ended the call by saying, "Grace is in motion." (Tr. 223). They argue that Gray did not testify to this version of the event and that Sweeney's testimony was manifestly prejudicial. The Iadarolas state that the testimony was admitted over objection. However, the record is not as clear as they suggest. The only objection voiced by defense counsel to this portion of Sweeney's testimony was as follows:

> Q. What next occurred?
>
> A. I sat there in the room for a while and there was a knock—the next—There was a knock on my door and I asked who it was it was again Chester Gray, and I let him in and he come in and we sat down and talked.
>
> Q. Please state that discussion.
>
> Mr. Evseroff: Objection.
>
> The Court: You have a continuing objection.
>
> Mr. Evseroff: The reason I made this one is that it was a different conversation. (Tr. 222).

The continuing objection which Judge Werker had granted to defense counsel was generally as to any testimony by Sweeney about conversations in which Gray told Sweeney what Rubin had said. (Tr. 220-21). The Government had previously argued that this evidence, consisting of Gray's prior consistent statements, was admissible to rebut a charge of recant fabrication. (Tr. 207). Thus, the objection relied upon in appellants' brief did not relate specifically to the variance between Gray's and Sweeney's testimony now assigned as error on appeal. Furthermore, at no point after the testimony was given did defense counsel move to have it stricken. Having failed to direct the district court's attention to the claimed prejudice engendered by this evidence and having failed to provide the court with an opportunity to give some curative instruction to the jury to ignore any such variance, objection to it should be viewed as waived for purposes of review upon appeal. *United States* v. *Indiviglio*, 352 F.2d 276, 279-80 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *DiLorenzo*, 429 F.2d 216, 220 n. 4 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971).*

Assuming *arguendo* that objection had been made timely, other proof adduced at trial clearly established that Grace Iadarola was, in fact, in motion and thus the admission of this testimony can hardly be considered prejudicial. According to Gray's testimony, Rubin had asked for Grace by name and, following the call, he said that his people would deliver the securities shortly. From that evidence alone, the jury could find that Grace was in motion. Before Rubin was arrested he stated that "his people" had the second treasury bill in Room 810,

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* Appellants complain that the prosecutor mentioned this evidence in summation. However, no objection was made to that by any defense counsel even then. (Tr. 829).

where Grace was subsequently found. From this, it was confirmed that Grace (and the others) had indeed been in motion. Accordingly, Sweeney's testimony on this point did not provide evidence against Grace Iadarola of a kind not already before the jury. Of course, the names of Victor and Benito Iadarola were not even mentioned by Sweeney in that portion of his testimony and therefore they can claim no prejudice from it.

2. The "inadmissible" documents.

Defendants assign error to the Government's attempt to place into evidence grand jury minutes and agents' reports which were used by defense counsel for impeachment of the witnesses upon cross-examination. The defendants claim of prejudice from these offers of evidence is premised on the assumption that the documents were inadmissible. Although the district court sustained the objection to the admission of this evidence, it is the Government's contention that it would have been proper to allow the minutes and reports into evidence in this case.

Upon the cross-examination of both Sweeney and Vezeris defense counsel clearly suggested that since the time that the prior statements were given the agents had fabricated portions of their testimony for the purpose of strengthening the case or conforming the testimony of the various Government witnesses. (Tr. 346-47, 661-62, 667-68, 670-72).* In the face of such an attack, the

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* Thus, for example, defense counsel cross-examined Sweeney as follows:

> Q. Did you ever put into your report or did you ever testify under oath before a grand jury that Gray ever made such a statement, Mr. Sweeney?
>
> A. No. There are a lot of things that don't go into a report.

[Footnote continued on following page]

grand jury minutes a[illegible]he agency reports, which essentially agreed with the agents' trial testimony, could be received into evidence as prior consistent statements which "rebut an express or implied charge . . . of recent fabrication or improper influence or motive." Rule 801 (d) (1) (B), Fed. R. of Ev.; *United States* v. *Grunewald*, 233 F.2d 556, 566 (2d Cir. 1956), *rev'd on other grounds*, 353 U S. 391 (1957); *United States* v. *DiLorenzo*, 429 F.2d 216 (2d Cir. 1970), *cert. denied*, 402 U.S. 950 (1971); *United States* v. *Dorfman*, 470 F.2d 246 (1972), *cert. denied*, 411 U.S. 923 (1973).

Moreover, defense counsels' references to portions of the minutes and reports entitled the Government, under th doctrine of completeness, to offer the other parts of the witnesses' statements for the purpose of giving the jury the full picture. *United States* v. *Fayette*, 388 F.2d 728, 733-34 & n.2 (2d Cir. 1968); *United States* v. *Corrigan*, 168 F.2d 641 (2d Cir. 1948). See Rule 106, Fed. R. of Ev.

Apart from the propriety of the offers, the defendants cannot persuasively show any prejudice from the mere offers of this evidence. The prejudice claimed is that the

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Q. I see. Are there a lot of things that you recall now for the first time here today, Mr. Sweeney, isn't that what it is.—(Tr. 346-47).

Vezeris was questioned along these lines:

Q. You were told that Mr. Gray and Mr. Sweeney both testified here that when the meeting broke up, Gray and Rubin went down to get something to eat and Sweeney went up to the room; is that correct?

A. No, sir, I was not told that is what they testified to.

Q. That that is what happened?

A. Prior to this trial I was told through investigative inquiries that that is what happened.

Q. You were clued in that that was their version of what happened, Mr. Vezeris, weren't you? (Tr. 670-72).

offers were "a tactic obviously designed to convey the impression to the jury that these documents contained material favorable" to the Government's cause that it could not put into evidence. (Br. at 24). Although the Government denies such bad faith and reiterates the offers were made with good legal basis, we need only point out that, in the presence of the jury, defense counsel accused the Government of engaging in precisely such a design. (Tr. 384). Any claimed prejudice was surely offset by defense counsel's combative accusation before the jury.

3. The court's charge on false exculpatory statements.

Defendants' last point in their claim of accumulated errors revolves around the district court's charge with regard to false exculpatory statements. First they contend that Judge Werker found, as a matter of law, that neither Benito nor Grace Iadarola had made a false exculpatory statement and, accordingly, the issue should not have been submitted to the jury. They further contend that the Court's charge failed to indicate that each defendant should be treated individually with respect to such evidence. Neither contention is meritorious.

At the outset it should be noted that only counsel for defendant Grace Iadarola excepted to the charge on false exculpatory statements, and that exception was taken on the specific ground that the court had found, as a matter of law, that she had not made a false exculpatory statement. (Tr. 922). Accordingly, claims of error on this point now raised by Benito Iadarola, and claims of error on other grounds now raised by Grace or Benito Iadarola may be reviewed for plain error only. Rules 30, 52(b), Fed. R. Crim. P.; *United States* v. *Pastore*, Dkt. No. 75-1428, slip op. 4307, 4313 (2d Cir., June 21, 1976);

United States v. *Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976), *cert. denied*, — U.S. —, 44 U.S.L.W. 3659 (May 19, 1976); *United States* v. *Dozier*, 522 F.2d 224, 228 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 461 (1976); *United States* v. *Rivera*, 513 F.2d 519, 526 & n.11 (2d Cir. 1975), *cert. denied*, — U.S. — (1976).

With respect to the point preserved by Grace Iadarola, the argument assumes that Judge Werker's view of the evidence as expressed upon his determination of the sufficiency of the evidence precluded a later determination by him that there was an issue of fact to be submitted to the jury. There is no such rule of law requiring a district court to be limited in this way and defendants cite no legal authority for their claim that Judge Werker was, in essence, barred from submitting the factual issue to the jury.

In any event, it is apparent from the record that Judge Werker made no finding, "as a matter of law," that Grace and Benito Iadarola had not made false exculpatory statements. Judge Werker's comment was made only within the context of his review of the independent, non-hearsay evidence. (Tr. 801). Later, when defense counsel specifically requested a charge that Grace Iadorala had not made false exculpatory statements, Judge Werker explicitly stated that he believed that to be an issue for the jury, as indeed it was. (Tr. 816).

As to the claim that the charge permitted the jury to use the false exculpatory statement of one defendant as evidence against the others, the language of the charge contained no such affirmative suggestion. The most that can be said for defendants' claim is that the charge did not include an explicit caution against the pitfall about which they now express concern. However, defendants

failed to submit a request to charge on this issue, even after Judge Werker noted that he had none available (Tr. 816) and they further failed to except to the charge as given. Moreover, the trial court did charge the jury that the jury was to decide whether *each* of the defendants was guilty or not guilty of any of the charges based on the jury's determination of the facts (Tr. 883-84); that a finding that a particular defendant was guilty of one count, should not control the jury's verdict as to any other charge as against any other defendant (Tr. 892-92a); and that guilt is personal and in order for the jury to return a verdict of guilty as to any charge in the indictment as to any defendant, the Government must have proven each element of the particular crime as against each defendant individually. (Tr. 892a-93). In this context, it is apparent that there was no error, and surely not the plain error which defendants would have to show to succeed on this issue.

POINT V

The trial court did not err in refusing to suppress the counterfeit treasury bill found in Rubin's hotel room.

The Iadarolas contend that since the second counterfeit treasury bill was not found until fifteen minutes after agents of the Secret Service had entered Rubin's hotel room, the search was not incident to the defendants' arrests and the bill should have been suppressed as the fruit of a warrantless search. In response to this claim the Government contended below and Judge Werker found that the search was conducted incident to lawful arrests and this evidence was therefore lawfully seized. (S. Tr. 2/19/76, 5-6).

The salient facts presented upon the suppression hearing were as follows: Upon arresting Rubin, various agents, including Heavey and Vezeris, and officers of the New York City Police Department proceeded to Rubin's hotel room where they found the Iadarolas. When the agents entered, Victor and Benito were seated on chairs at the foot of the bed and Grace Iadarola was on the bed. The agents thereupon informed the Iadarolas that they were under arrest, removed Victor and Benito Iadarola from their chairs and searched them. Grace Iadarola was not searched because there was no matron present. She was, however, directed to get off the bed whereupon she proceeded to sit on the dresser located in the room even though there were three vacant chairs in the room. (S.Tr. 2/18/76, 127-28). Moreover, the dresser was higher than normal table height and Grace Iadarola was pregnant. (S. Tr. 2/18/76, 92, 94-95).

During the next ten minutes, while Victor and Benito Iadoarola were being examined, Grace Iadarola remained on the dresser. Thereafter, on Heavey's instruction, Grace Iadarola got off the dresser. Heavey then interviewed her. While Heavey interviewed her, Vezeris searched the dresser finding the second counterfeit bill. (S. Tr. 2/18/76, 128-31; GX S-1). Vezeris found the bill approximately fifteen minutes after the agents first entered the room. (S. Tr. 2/18/76, 120-21). The search of the entire room took approximately thirty minutes, at the end of which the Iadarolas were taken from the room. (S. Tr. 2/18/76, 123).

At the conclusion of the hearing, the district court made the following findings:

> Now, with respect to the search of the room, it seems to me that that search falls within the category of a search incidental to an arrest, and if that is not sufficient in this Court's opinion at least a piece of paper is as easily destroyed as narcotics, and to say that the officers under these

> circumstances should have gotten a search warrant given the evidence which they then had in their possession as to the participation of the Iadarolas, I think would have been asking them to go beyond what is required of police officers under these circumstances.
>
> I further bolster that by saying although they might search the two males in Room 810 they were not able to search the female by reason of the fact that a matron was not present. I think it was significant that a lady who was pregnant sat on a dresser which has been described as being higher than a regular table, I think it significant that she sat on that end of the dresser in which the particular certificate was found.
>
> And it was only as a result of a full search of that room, which was within easy reaching distance of any of these defendants, that that certificate was found. (S. Tr. 2/19/76, 5-6).

It is clear that, as Judge Werker determined, the search was entirely lawful. A search incidental to an arrest is based upon the need to disarm the arrestee and to discover evidence; it includes not only a search of the person of the arrestee but the immediate area within his or her control. *Chimel* v. *California*, 395 U.S. 752, 793 (1969). In this case, Judge Werker found the drawer in which the counterfeit bill was found to be within "easy reaching distance of any of these defendants. . . ." Given particularly the freedom of movement which Grace Iadarola was accorded because a female officer was not present, and given her apparent effort to take advantage of that freedom of movement, the search of the drawer was reasonable.

Although it is not entirely clear from appellants' brief, it appears that the appellants' essential objection

to the search is that there was a fifteen minute hiatus between the arrests and the discovery of the counterfeit bill. However, a search, to be incident to an arrest, need only be "substantially contemporaneous" with the arrest. *United States* v. *Maslanka*, 501 F.2d 208, 214 (5th Cir. 1974), *cert denied*, 421 U.S. 912 (1975). The only delay involved here was caused by the very process of arresting and searching the defendants.

The district court's factual findings upholding the search were not clearly erroneous. Indeed, defendants do not attack them as such. Its legal conclusions were well-founded in law. Accordingly, the denial of defendants' motions to suppress should be upheld.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

EDWARD J. LEVITT,
Special Attorney,
United States Department of Justice,
AUDREY STRAUSS,
Assistant United States Attorney,
Of Counsel.

★ U. S. Government Printing Office 1976—614—354—N.Y.J.SF—53

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PETER SUDLER
SPECIAL ATTORNEY being duly sowrn, deposes and says that he is employed in the office of the Strike Force for the Southern District of New York.

That on the 26th day of August, 1976 he served ~~one~~ two copies of the within Brief - 76-1217 by placing the same in a properly postpaid franked envelope addressed:

WILLIAM SONENSHINE, ESQ
EVSEROFF & SONENSHINE, ESQ
186 JORALEMON Street
Brooklyn, N.Y. 11201

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Peter Sudler

PETER SUDLER
SPECIAL ATTORNEY

Sworn to before me this
26th day of August, 1976
William I. Aronwald

WILLIAM I. ARONWALD
Notary Public, State of New York
No. 4505839
Qualified in Rockland County
Commission Expires March 30, 1977

U.S. Department of Justice
Organized Crime & Racketeering Section
Joint Strike Force
1 St. Andrews Plaza 3rd Floor
NEW YORK, NEW YORK 10007